

EXHIBIT C

Rebecca Hersher
National Public Radio, Inc.
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Washington, DC 20002
202-513-2127

VIA EMAIL TO: MATTHEW.HURD@USDOJ.GOV

August 14, 2018

Director, Office of Information Policy (OIP)
U.S. Department of Justice
1425 New York Ave., NW, Suite 11050
Washington, DC 20530

FOIPA Request No.: 1403613-000
Subject: Video Recordings of Ballistics Tests (Common Handgun and Rifle Ammunition)

ADMINISTRATIVE APPEAL FROM DENIAL OF FOIA REQUEST

To Whom It May Concern:

In response to the Federal Bureau of Investigation's ("FBI") May 22, 2018, letter denying my April 19, 2018, Freedom of Information Act ("FOIA") request filed on behalf of National Public Radio, Inc. ("NPR") for video recordings of ballistics tests of common handgun and rifle ammunition, I hereby appeal from that denial. The basis of my appeal is that the FBI has not met its burden to invoke 5 U.S.C. §552(b)(7)(E) ("Exemption 7(E)").

I. Background

On April 19, 2018, I submitted a FOIA request to the FBI on behalf on NPR, which is attached hereto as Exhibit A. I requested "video recordings of ballistics tests conducted with common handgun and rifle ammunition, fired into ballistics gelatin" relating to common ammunition in multiple calibers and cartridges including but not limited to: .9mm full metal jacket, .9mm expanding, .22 full metal jacket, and .223 full metal jacket. I also asked that the recordings be made available in digital form as AVI, FLV, MP4, MOV or another widely used video filetype. Though I offered to pay reasonable duplication fees, as a representative of the news media seeking these records on behalf of NPR for dissemination to the public, I asked for a waiver of those fees. I requested that you justify all deletions by reference to specific exemptions of the act.

On May 22, 2018, I received the FBI's response letter, which stated that "[m]aterial responsive to your request is being withheld in full" under FOIA exemption 7(E) "and your request is being closed." The FBI's response did not address my request for a fee waiver. Nor did the response provide any basis for the denial under Exemption 7(E). A copy of the response letter is attached hereto as Exhibit B.

II. The FBI Has Failed to Meet Its Burden to Invoke Exemption 7(E)

“FOIA reflects ‘a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language’.”¹ Here, the FBI seeks to exempt the requested records from disclosure under Exemption 7(E). The FBI has failed to meet its burden to show it satisfies the exemption.

A. The FBI’s Conclusory Assertion of Exemption 7(E) Is Insufficient

In claiming FOIA exemptions, the burden falls on the government to demonstrate that the “‘requested material’ need not be produced because a particular FOIA exemption protects the material from disclosure.”² The government fails to meet its burden to invoke Exemption 7(E) when, as here, its assertion merely cites the exemption without explaining how it applies.³ The FBI has made no attempt to explain a basis for withholding records under Exemption 7(E). On that basis alone, the OIP should grant this appeal and the FBI should release the requested records.

B. Exemption 7(E) Does Not Apply to Routine Techniques and Procedures Already Well Known to the Public, Such as Ballistics Tests Requested Here

Even if the government had provided some basis for its reliance on the exemption, it would not have met its burden. Records are exempt under exemption 7(E), “to the extent that the production of such law enforcement records or information...would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.”⁴ Exemption 7(E) “extends to information regarding obscure or secret techniques.”⁵ Indeed, the Conference Report for the 1974 amendments to FOIA that added Exemption 7(E) specifically states that “the scope of this exemption against disclosure of ‘investigative techniques and procedures’ should *not* be interpreted to include routine techniques and procedures already well known to the public, such as *ballistics tests*, fingerprinting, and other scientific tests or commonly known techniques.”⁶ Courts have routinely relied on the Conference Report to find that Exemption 7(E) does not exempt routine techniques and procedures already well known to the public.⁷

¹ *U.S. Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 494 (1993) (citing *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 360–61 (1976)).

² *Dugan v. U.S. Dep’t of Justice*, 82 F. Supp. 3d 485, 494 (D.D.C. 2015) (citing *Petroleum Info. Corp. v. U.S. Dep’t of Interior*, 976 F.2d 1429, 1433 (D.C. Cir. 1992)).

³ See *Banks v. Dep’t of Justice*, 813 F. Supp. 2d 132, 146 (D.D.C. 2011) (finding that a “vague” or “conclusory” assertion of Exemption 7(E) is insufficient); *Voinche v. FBI*, 412 F. Supp. 2d 60, 69 (D.D.C. 2006) (finding that “the FBI failed to adequately explain the appropriateness of claiming the exemption” where it merely quoted the language of Exemption 7(E) and stated “general principles related to Exemption 7(E)”).

⁴ 5 U.S.C. §552(b)(7)(E).

⁵ *Jaffe v C.I.A.*, 573 F. Supp. 377, 387 (D.D.C. 1983) (citing *Shaver v. Bell*, 433 F. Supp. 438, 441 (N.D. Ga.1977)).

⁶ H.R. Rep. No. 93-1380, at 229 (1974) (Conf. Rep.) (emphasis added).

⁷ See, e.g., *Albuquerque Publ’g Co. v. Dept. of Justice*, 726 F. Supp. 851, 858 (D.D.C. 1989) (relying on the Conference Report to interpret Exemption 7(E) to apply only to law enforcement techniques generally unknown to the public); *Dunway v. Webster*, 519 F Supp. 1059, 1082-83 (N.D. Cal. 1981); *Malloy v. U. S. Dep’t of Justice*, 457 F. Supp. 543, 545 (D.D.C. 1978).

Here, I am requesting general information about ballistics tests of standard handgun and rifle ammunition. The Conference Report makes clear that such a test is not subject to the exemption. The FBI has put forth no showing otherwise. Nor has the FBI explained how releasing generic videos of ballistics tests that could reveal anything about individual investigations or could hinder the FBI investigations. Lest there be any doubt, NPR does *not* seek identifying information regarding FBI cases or investigations, but only generic video recordings of ballistics tests. The FBI may redact identifying information regarding FBI cases or investigations rather withhold the records in full as it stated it has done.

III. Conclusion

The Supreme Court's directive is that "disclosure, not secrecy, is the dominant objective of FOIA."⁸ The FBI provides no facts support of its determination that Exemption 7(E) applies. The records I seek only pertain to the science of ballistic testing, not a specific case. Such information would not disclose private techniques or procedures of the FBI. Accordingly, I ask that you grant my appeal.

Sincerely,

Rebecca Hersher

⁸ *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 494 (1993).

EXHIBIT A

From: efoia@subscriptions.fbi.gov
To: [Rebecca Hersher](#)
Subject: eFOIA Request Received
Date: Thursday, April 19, 2018 4:12:24 PM

Organization Representative Information

**Organization
Name**

Prefix

First Name

Middle Name

Last Name

Suffix

Email

Phone

Location

Domestic Address

Address Line 1

Address Line 2

City

State

Postal

Agreement to Pay

How you will pay

I am requesting a fee waiver for my request and have reviewed the FOIA reference guide. If my fee waiver is denied, I am willing to pay additional fees and will enter that maximum amount in the box below.

Allow up to \$

Proof Of Affiliation for Fee Waiver

**Waiver
Explanation**

I agree to pay reasonable duplication fees for the processing of this request, but I ask for a waiver of fees because the information as used by National Public Radio is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the act. I reserve the right to appeal your decision to withhold any information or to deny a waiver of fees.

**Documentation
Files**

Non-Individual FOIA Request

**Request
Information**

Dear FBI FOIA Officer,

I am requesting federal records under 5 U.S.C. ?? 552(a)(3).

I am requesting video recordings of ballistics tests conducted with common

handgun and rifle ammunition, fired into ballistics gelatin. I am requesting video of common ammunition in multiple calibers and cartridges including but not limited to: .9mm full metal jacket, .9mm expanding, .22 full metal jacket, and .223 full metal jacket. I ask that the recordings be made available in digital form as AVI, FLV, MP4, MOV or another widely used video filetype.

If any or all of this request is denied, please state under which FOIA exemption you are denying it. Please respond to my request via email, and call me on the phone with questions. Thank you. I agree to pay reasonable duplication fees for the processing of this request, but I ask for a waiver of fees because the information as used by National Public Radio is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the act. I reserve the right to appeal your decision to withhold any information or to deny a waiver of fees.

In addition to communicating with me about this request, you may also communicate with my attorney, Micah Ratner in NPR's Office of General Counsel.

My telephone number is (202) 513-2127 and my e-mail address is rhersher@npr.org. Mr. Ratner's telephone number is 202-513-2045 his e-mail address is mratner@npr.org.

Best,
Rebecca Hersher
National Public Radio

EXHIBIT B



Federal Bureau of Investigation

Washington, D.C. 20535

May 22, 2018

MS. REBECCA HERSHER
NATIONAL PUBLIC RADIO
1111 NORTH CAPITOL STREET NE
WASHINGTON, DC 20002

FOIPA Request No.: 1403613-000
Subject: Video Recordings of Ballistics Tests
(Common Handgun and Rifle Ammunition)

Dear Ms. Hersher:

This letter is in response to your Freedom of Information Act (FOIA) request.

Material responsive to your request is being withheld in full pursuant to Title 5, U.S. Code 522, subsection (b)(7)(E) [5 U.S.C. § 552 (b)(7)(E)], and your request is being closed. See the attached explanation of exemptions.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV (2010)). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

For questions regarding our determinations, visit the www.fbi.gov/foia website under "Contact Us." The FOIPA Request number listed above has been assigned to your request. Please use this number in all correspondence concerning your request. Your patience is appreciated.

You may file an appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, D.C. 20530-0001, or you may submit an appeal through OIP's FOIA online portal by creating an account on the following web site: <https://foiaonline.regulations.gov/foia/action/public/home>. Your appeal must be postmarked or electronically transmitted within ninety (90) days from the date of this letter in order to be considered timely. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal." Please cite the FOIPA Request Number assigned to your request so that it may be easily identified.

You may seek dispute resolution services by contacting the Office of Government Information Services (OGIS) at 877-684-6448, or by emailing ogis@nara.gov. Alternatively, you may contact the FBI's FOIA Public Liaison by emailing foipaquestions@ic.fbi.gov. If you submit your dispute resolution correspondence by email, the subject heading should clearly state "Dispute Resolution Services." Please also cite the FOIPA Request Number assigned to your request so that it may be easily identified.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Hardy", is placed below the word "Sincerely,".

David M. Hardy
Section Chief
Record/Information
Dissemination Section
Records Management Division

Enclosure

EXPLANATION OF EXEMPTIONS**SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552**

- (b)(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified to such Executive order;
- (b)(2) related solely to the internal personnel rules and practices of an agency;
- (b)(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
- (b)(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (b)(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (b)(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (b)(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;
- (b)(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- (b)(9) geological and geophysical information and data, including maps, concerning wells.

SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552a

- (d)(5) information compiled in reasonable anticipation of a civil action proceeding;
- (j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals;
- (k)(1) information which is currently and properly classified pursuant to an Executive order in the interest of the national defense or foreign policy, for example, information involving intelligence sources or methods;
- (k)(2) investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(3) material maintained in connection with providing protective services to the President of the United States or any other individual pursuant to the authority of Title 18, United States Code, Section 3056;
- (k)(4) required by statute to be maintained and used solely as statistical records;
- (k)(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or for access to classified information, the disclosure of which would reveal the identity of the person who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service the release of which would compromise the testing or examination process;
- (k)(7) material used to determine potential for promotion in the armed services, the disclosure of which would reveal the identity of the person who furnished the material pursuant to a promise that his/her identity would be held in confidence.